IN THE SUPREME COURT

OF

THE UNITED STATES

1974-75 TERM

No. 75-76

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SUPREME COURT, U.S.

STATE OF SOUTH DAKOTA,
Petitioner,

-vs-

DONALD OPPERMAN,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.

The Respondent, DONALD OPPERMAN, respectfully prays that this Court enter an order denying the Petition for Writ of Certiorari to review the judgment of the Supreme Court of South Dakota entered in the above-entitled case on April 15, 1975.

I. THE JUDGMENT BELOW IS IN COMPLETE AGREEMENT WITH THE DECISIONS OF THIS COURT.

This Court has stated that for purposes of the Fourth Amendment there is a Constitutional difference between houses and cars, Chambers v. Maroney, 399 U.S. 42, 52, 90 S.Ct. 1975, 1982, 26 L.Ed.2d 419 (1970) and that these distinctions stem from both the highly mobile character of the automobile and the fact that, the extensive, and often noncriminal contact with automobiles will bring local officials in 'plain view' of evidence, fruits, or instrumentalities of a crime, or contraband, Cady v. Dombrowski 413 U.S. 433, 442 93 S.Ct. 2523, 2528, 37 L.Ed.2d 706 (1973). However, irrespective of these distinctions this Court has consistently held that Fourth Amendment protections against unreasonable searches and seizures are afforded to automobiles.

The standard for testing the validity of a search of a motor vehicle is whether the search was unreasonable under all circumstances. Preston V. United States, 376 U.S. 364, 367, 84 S.Ct. 881 (1964). It is clear from reading the opinions of this Court that mere legal custody of an automobile by the police does not create some new possessory right to justify the search of the vehicle.

In Cooper v. California, 386 U.S. 58, 61, 87 S.Ct. 788, 17 L.Ed.2d 730, this Court pointed out that "'lawful custody of an automobile does not of itself dispense with constitutional requirements of searches thereafter made of it.'" The Court indicated that "the reason for and nature of the custody may constitutionally justify the search," and it held that custody of an automobile held as evidence of crime and pending forfeiture was such custody. And in Chambers v. Maroney 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970) the Court validated a search of an automobile in lawful police custody only because there was probable cause to believe it contained weapons and stolen money.

The State argues that Cady v. Dombrowski, 413 U.S. 433, 93 S.Ct. 2523, 37 L.Ed.2d 706 (1973) supports the use of inventory procedures employed in this case. This argument completely ignores the Court's emphasis on the factual considerations present in Cady and absent here. First, the vehicle in Cady was disabled as the result of an accident and constituted a nuisance along the highway. The driver, being intoxicated and later comatose, could not have made arrangements to have the car towed and stored. Second, the police conducted the search for the revolver to protect the public from the possibility that it might fall into untrained or malicious hands. The motorist in Cady was a Chicago policeman. The police of Kewaskum, Wisconsin, believed he was required by regulation to carry his service revolver at all times. They therefore had reason to believe that the vehicle contained the revolver when it was not found on his person.

To argue that the holding announced in Cady is applicable to the instant case ignores the vast factual distinction between the two cases. In the instance case, the vehicle was not in a position where it could be considered a public nuisance. There is no indication that Mr. Opperman cound not have made arrangements for the safekeeping of the vehicle at the time or after it was towed from the Vermillion street. And most important, there was no reason for the Vermillion police to believe that the car contained anything that may threaten the safety of the public.

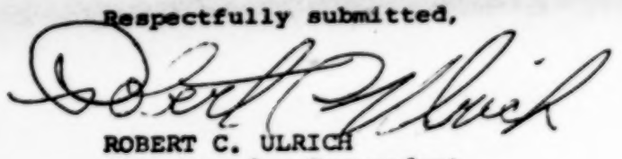
The Government further contends that the holding in this case conflicts with Harris v. United States, 390 U.S. 234, 88 S.Ct. 992, 19 L.Ed.2d 1067 (1968) and Cooper v. California, 386 U.S. 58, 87 S.Ct. 788, 17 L.Ed.2d 730 (1967). In Harris, evidence in plain view of a police officer, who was taking reasonable steps for the protection of the car, was held admissible. The reasonable steps taken for the protection of the impounded motor vehicle in that case dealt with the rolling of windows and locking of doors. This permissible police conduct certainly cannot be equated with breaking into a locked automobile and entering into the confines of the closed glove compartment even though both actions are said to be taken for the protection of the owner's property. Cooper also is a different case than what we have here. The automobile in Cooper was seized pursuant to statute specifying forfeiture of the car for its unlawful use. There was a close relationship between the reason for the arrest and the search, as well as the reason the vehicle was in custody. None of these considerations are applicable here.

In this case the Government cannot justify the intrusion into the Respondent's closed glove compartment within noted exceptions to the warrant requirement but rely solely upon the mere custody of the automobile and the existence of a police regulation. Such an argument does not seem adequate to justify the substantial invasion of Fourth Amendment protections involved here. The essential test of the validity of a search is reasonableness, yet the standard of reasonableness must be evolved in light of the Fourth Amendment, not in light of what the Government's view of reasonable police procedure might be. In addressing itself to a contention that it was reasonable to search an entire house without a warrant when a suspect is arrested in the house, the Supreme Court said in Chimel v. California, 395 U.S. 752, 764-765, 89 S.Ct. 2034, 2041, 23 L.Ed.2d 685 (1969);

> But the argument is founded on little more than a subjective view regarding the acceptability of certain sorts of police conduct, and not on considerations relevant to Fourth Amendments interests. Under such an unconfirmed analysis, Fourth Amendment protections in this area would reach the evaporation point.

The Repondent submits that the judgment of the Supreme Court of South Dakota is in complete agreement with the prior opinions of this Court and prays that an order be granted dismissing the Petition for Writ of Certiorari.

Respectfully submitted,



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